IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11355 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MALEK UMARKHAN ALIKHAN

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 11355 of 2002

MR DA SURANI for Petitioner No. 1

Mr. P.D. Bhate, AGP for Respondent No. 1,4

MR HS MUNSHAW for Respondent No. 2/3.

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 16/07/2003

ORAL JUDGEMENT

In the matter of DS Nakara and Others versus

Union of India, reported in 1983 SCC Lab & Service page 145, larger bench of the Hon'ble Apex Court has observed that the pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer, nor an ex gratia payment. The observations made by the larger Bench of the Hon'ble Apex Court in which are relevant for the purpose of present petition are reproduced as under:

"(1) Pension is neither a bounty not a matter of grace depending upon the sweet will of the employer, nor an ex gratia payment. It is a payment for the past service rendered. It is a social welfare measure rendering socio economic justice to those who in the hey day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch. Pension as a retirement benefit is in consonance with and furtherance of the goals of the Constitution. The most practical raison d'etre for pension is the inability to provide for oneself due to old age. It creates a vested right and is governed by the statutory rules such as the Central Civil Services (Pension) rules which are enacted in exercise of power conferred by Articles 309 and 148(5) of the Constitution."

The observations made by the Hon'ble Apex Court in para 26 of the said judgment are also relevant in the facts of the present petition. Same are, therefore, reproduced as under:

"26. Let us therefore examine what are the goals that pension scheme seeks to subserve ? A pension scheme consistent with available resources must provide that the pensioner would be able to live; (i) free from want, with decency, independence and self respect and (ii) at a standard equivalent at the pre-retirement level. This approach may merit the criticism that if a developing country like India cannot provide an employee while rendering service aliving wage, how can one be assured of it in retirement ? This can be aptly illustrated by a small illustration.A man with a broken arm asked his doctor whether he will be able to play the piano after the cast is removed. When assured that he will, the patient replied, 'that is funny, I could not before'. It appears that determining the minimum amount required for

living decently is difficult, selecting the percentage representing the proper ratio between earnings and the retirement income is harder. But it is imperative to note that as self sufficiency declines the need for his attendance or institutional care grows. Many are literally surviving now than in the past. We owe to it them and ourselves that they live, not merely exist. The philosophy prevailing in a given society at various stages of its development profoundly influences its social objectives. These objectives are in turn a determinant of a social policy. The law is one of the chief instruments whereby the social policies implemented and

pension is paid according to rules which can be said to provide social security law by which it is meant those legal mechanisms primarily concerned to ensure the provision for the individual of a cash income adequate when taken along with the benefits in kind provided by other social services (such as free medical aid) to ensure for him culturally acceptable minimum standard of living when the normal means of doing so failed. (See Social Security Law by Prof. Harry Calvert, p.1)."

The observations made by the Hon'ble Apex Court in para 34 of the said judgment are also relevant in the facts of the present petition. Same are, therefore, reproduced as under:

"34. To some extent this approach will find support in the judgment in Minerva Mills Ltd. v. Union of India [1981] 1 SCR 206 :(1980) 3 SCC 625 : AIR 1980 SC 1789]. Speaking for the majority, Chandrachud, CJ observed as under: (SCC p.654, para 57)

'This is not mere semantics. The edifice of our Constitution is built upon the concepts crystallized in the preamble. We resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice social, economic and political.

> We, therefore, put Part IV into our Constitution containing directive principles of State policy which specify the socialistic goal to be achieved.'

At a later stage, it was observed that the fundamental rights are not an end in themselves but are the means to an end, the end is specified in Part IV. Bhagwati, J. In his minority judgment after extracting a portion of the speech of the then Prime Minister Jawahar Lal Nehru, while participating in a discussion on the Constitution (First Amendment) Bill, observed that the directive principles are intended to bring about a socio economic revolution and to create a new socio economic order where there will be social and economic justice for all and everyone, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development and exercise the fundamental rights. It, therefore, appears to be well established that while interpreting or examining the constitutional validity of legislative/administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other."

Heard learned advocate Mr. D.A. Surani for the petitioner; Mr. P.D. Bhate, learned AGP for respondents no.1/4 and Mr. H.S. Munshaw, learned advocate for respondents No.2 and 3.

Rule. Learned AGP Mr. Bhate appearing for respondents no.1 and 4 as well as Mr. H.S. Munshaw appearing for the respondents no.2 and 3 have waived service of notice of rule on behalf of the said respondents. In the peculiar facts and circumstances of the case and with the consent of the learned advocates for the parties, the matter is taken up for final hearing today itself.

Brief facts of the present petition are to the effect that on 25th February, 1978, the petitioner was

appointed as class IV employee in the office of the respondent NO. 3. The petitioner continuously worked with respondent NO. 3 without any complaint upto 31st October, 1991 and the petitioner retired on 31st October, 1991 by reaching the age of superannuation. According to the petitioner, the amount of gratuity and leave encashment has been given to the petitioner but the petitioner has not been given the benefit of pension and for that, the petitioner made request but the same was not considered and, therefore, on 2.9.2000, an application in writing was given by the petitioner with a request to grant benefit of pension in accordance with the Government Resolution dated 17th October, 1988 because on the same basis, amount of gratuity and leave encashment has been paid to the petitioner but the respondent no.2 has not paid such benefit of pension to the petitioner and no reply has been given to the said application by the respondent. Thereafter, again, the petitioner made representation to the Collector on 5.1.2001 wherein it was requested by the petitioner before the collector to direct the respondents no.2/3 to give pensionary benefits as per the GR dated 17.10.1988. In view of the said representation made by the petitioner, the Collector Surendranagar by letter dated 15th January, 2001, directed the respondent no.2 to take appropriate action for giving pension to the petitioner. In view of the said letter dated 15.1.2001, the respondent no.2 directed the respondent no.3 to do needful in the matter by letter dated 24th January, 2001. According to the petitioner, ultimately, the result was nil of all these attempts and, therefore, the petitioner filed special civil application no. 9325 of 2001 wherein the respondents were directed by this court to consider the case of the petitioner for pensionary benefits by order dated 25th December, 2001 but thereafter also, the case of the petitioner was not considered by the respondents and, therefore, the petitioner filed review application being Misc. Civil Application No. 799 of 2002 before this court wherein this Court further directed the respondents to give pensionary benefits to the petitioner in accordance with the Government Resolution dated 17th October, 1988. Thereafter, the respondent authority namely Executive Engineer, Panchayat R & B Division, Surendranagar has, by his order dated 13.8.2002, ordered that the petitioner is not entitled for such benefits because he has not completed ten years of service and has completed only nine years of service and, therefore, he is not entitled for such benefits as per GR dated 17.10.1988 which is at page 29, Annexure-I. At page 33, working days of the petitioner have been certified by the Deputy Executive Engineer of the

respondent Panchayat from year 1978 to 1991 have been mentioned while considering the date of joining 21st February, 1978 and the date of his retirement 31st October, 1991.

Learned advocate Mr. Surani appearing for the petitioner has submitted that the petitioner has retired on 31.10.1991 on his having reached the age of superannuation and thereafter 12 years have gone but his case for pension has not been properly considered by the respondent authorities and that has deprived the petitioner from his legal right to receive pension for the services rendered by him. Not only that, he approached various authorities in-between with a request his case for pension as per the GR dated 17.10.1988 but ultimately, his claim has been refused by answer dated 13.8.2002, page 27. In the said letter, it has been written that as per the Resolution of the Government dated 17.10.88, the pensionary benefits have to be extended only in favour of those workmen who have completed 10 years service with full presence of 240 days each year during such ten years. As regards the case of the petitioner, it has been stated in the said letter that the petitioner has retired on 31.10.1991 on account of superannuation and during his service, presence of 240 days has been only for nine years and, therefore, his service is not pensionable service as per the GR dated 17.10.88 and, therefore, the petitioner is not entitled for the pensionary benefits as per the said Resolution. Learned advocate Mr. Surani appearing for the petitioner has submitted that such an interpretation of the GR dated 17.10.1988 made by the Panchayat authority is erroneous depriving the petitioner from his legitimate right to receive pension and, therefore, same is required to be quashed and set aside by directing the respondents to pay the pensionary benefits to the petitioner. He also submitted that item 3 page 30 of the said Government Resolution dated 17.10.1988 provides that those daily wager who has completed the service of more than ten years as provided under section 25(B) shall be considered permanent and such permanent labour shall be placed in the pay scale of Rs.750-940 plus other allowances. As per the said item 3 of the said GR, it has been resolved that such daily wagers should be given the pension, gratuity, general provident fund in accordance with the existing rules and regulations and they would be entitled for Sunday leave and national holidays leave over and above two leave per year as well as 14 days casual leave, 30 days' earned leave and 20 days half pay leave (medical leave). He, therefore, after reading item 3 of the said GR dated 17.10.88, submitted that for such daily wager,

it is not necessary to establish that he has rendered continuous ten years service with 240 days work in each year and, therefore, the interpretation of the said GR dated 17.10.1988 made by the respondent authority is bad, illegal and against the spirit of the said resolution and, therefore, same is required tobe quashed and set aside. It was also submitted by him that the said GR dated 17.10.1988 specifies that those daily wagers who have completed the service of more than ten years as defined under section 25(B) shall be considered permanent and such permanent labour shall be given the pension, gratuity, general provident fund in accordance with the existing rules and regulations and, therefore, such an interpretation made by the respondents is contrary to the provisions of section 25(B). According to his submission, if section 25(B) as well as page 33 wherein working days of the petitioner have been specified and certified by the respondent authority both are construed properly, then, it would become clear that the interpretation put forth by the respondent Panchayat authority is erroneous and as such, the petitioner is entitled for such benefits.

As against that, learned advocate Mr. Munshaw appearing for respondents no.2/3 has submitted that the GR dated 17.10.1988 is required to be interpreted in a way that on each year, 240 days must have to be completed by the daily wager and on that basis, ten years continuous service must have to be established otherwise, such daily wager is not entitled for such pensionary benefits as per the said GR dated 17.10.88. He also relied upon the clarification issued by the State Government on 30th May, 1989 issued by the Government in view of the objections and clarifications sought by various departments . First of all, learned advocate Mr. Munshaw has brought to the notice this court item no.2 of the said modification wherein the question was raised as to how many working days are required in each year for considering continuous service and in between, in any year, if the continuous service and the working days is not satisfied by such a daily wager, then, how many years is required to be deducted from the service; whether such type of service can be considered to be continuous or not and whether the earlier services rendered by such a daily wager , looking to his working days, can be considered for considering claim of pension of such a daily wager. Against such questions, opposite column of the said modification is the answers that the daily wager when he joined the service and if he completes the service as defined under section 25(B) of the ID Act and completes 240 days service within 12 months period, that may be

considered to be one year's continuous service and accordingly, if ten years have been completed by the workman, then, such workman is entitled for such benefits under the Govt. Resolution dated 17.10.88 and the rest of the years are required to be excluded from the calculation wherein such workman is not completing 240 days within 12 months period. Learned advocate Mr. Munshaw has brought to this Court's notice item no. 38 and 39. As per item 38, it is clarified that according to section 25(B) of the ID Act, within 12 months period, on each year, if the workman is completing 240 days, that can be considered to be one year service and accordingly, such year is required to be calculated and if the daily wager has completed five years, ten years or fifteen years, same may be taken into account. Item 39 further clarifies that earlier clarification in the year 1973 is now not applicable to the facts of the case because after ten years or five years, daily wager need not to be taken on the work charge establishment and, therefore, the period of five years, ten years or fifteen years is required to be calculated as per item 38. In short, the sum and substance of the submissions made by the learned advocate Mr. Munshaw is to the effect that the petitioner has not completed 240 days continuous service as defined under section 25(B) of the ID Act in each year and therefore, in view of the modification as aforesaid pointed out by him, the years wherein the petitioner is not completing 240 days continuous service are required to be excluded while considering year of service and in view of such consideration based on the clarification made by the Government in 1989, the petitioner is not entitled for such pensionary benefits as per the GR dated 17.10.88 and the authority was right in rejecting the claim of the petitioner on that ground. Save and except these submissions, no other submissions were made by the learned advocate Mr. Munshaw on behalf of the Panchayat authority.

Learned AGP Mr. Bhate appearing for the State Authorities has relied upon the answer given by the Panchayat authority and has pointed out that the authority was right in rejecting the claim of the petitioner as the petitioner has not completed 240 days continuous service in each year as per section 25(B) of the Act and, therefore, his claim was rightly rejected by the Panchayat authority and the petitioner is not entitled for such pensionary benefits. Except these submissions, no other submissions were made by the learned AGP Mr. Bhate on behalf of the State Authority.

Considering the entire facts and circumstances of

the present case, according to my opinion, the controversy involved in the present petition is the controversy created by the respondents themselves without considering the provisions of section 25(B) of the I.D. Act, 1947. It is surprising to the court that both the learned advocates representing the present respondents have made their submissions and interpreted the Government Resolution dated 17.10.1988 in their own manner, described from the reply given by the respondent authorities but none of the advocates for the respondent authorities have brought to the notice of this court relevant provisions of section 25(B) of the ID Act and have also not read the same before this Court. This Court is of the view that the provisions contained in section 25(B) of the ID Act,1947 itself is the answer to the controversy raised or created by the respondents. This Court is also of the view that while considering the case of the petitioner, the respondents have not taken into consideration the provisions contained in section 25(B) of the ID Act. Since the said provisions are relevant and material for the purpose of resolution of the controversy involved in the present petition, reproduced as under:

"25-B. Definition of continuous service. - For the purpose of this Chapter,

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not legal, or a lock out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of Cl.(1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred forty days in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than

(i) ninety five days in the case of a workman employed below ground in a mine and

(ii) one hundred and twenty days, in any other case.

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under the employer -

(a) for a period of one year if the workman, during a period of twelve calender months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than

(i) one hundred and ninety days in the case of a workman employed below ground in mine and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than

(i) ninety five days in the case of a workman employed below ground in a mine and

(ii) one hundred and twenty days in any other case.

Thus, this section is having two facets defining the term 'continuous service' for the purpose of Chapter VA. Sub section (1) of section 25B of the ID Act provides that a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not legal, or a lock out or a cessation of work which is not due to any fault on the part of the workman and sub section (2) of section 25B of the ID Act provides that where a workman is not in continuous service within the meaning of clause (1) for a

period of one year or six months, he shall be deemed to be in continuous service under the employer

-(a) for a period of one year if the workman, during a period of twelve calender months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than

(i) one hundred and ninety days in the case of a workman employed below ground in mine and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than

(i) ninety five days in the case of a workman employed below ground in a mine and

(ii) one hundred and twenty days in any other case.

These two sub sections (1) and (2) of section 25-B of the ID Act, 1947 have been interpreted by the Hon'ble Supreme Court in case of Workmen of American Express International Banking Corporation versus Management of American Express International Banking Corporation reported in AIR 1986 SC 458 and has observed that while calculating the actual working of 240 days in a year in respect of the workman, days of holiday and other festival holidays are required to be included and after including such holidays and festival holidays, if the workman has completed 240 days, then, he is entitled for the benefit of section 25-F of the I.D. Act, 1947. This aspect has been considered in paragraph 5 of the judgment by the Hon'ble apex court are to the effect that; " the expression 'actually worked under the employer' cannot mean those days only when the workman worked with hammer, sickle or pen but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statutes, standing orders etc. " It has also been observed by the Hon'ble apex court in the said judgment that; " We do not think that we are entitled to so constrain the construction of the expression 'actually worked under the employer'. The explanation is only clarificatory, as all explanations are, and cannot be used to limit the expanse of the main provision. If the expression 'actually worked under the employer' is capable of comprehending the days during

which the workman was in employment and was paid wages and we see no impediment to so construe the expression there is no reason why the expression should be limited by the explanation. To give it any other meaning then what we have done would bring the object of S. 25-F very close to frustration. It is not necessary to give examples of how S. 25-F may be frustrated as they are too obvious to be sated. "

In view of these observations made by the Hon'ble apex court in the aforesaid decision, expression of 'actually worked under the employer' has been made clear that if any employee is entitled for holiday after completing one year service under the statutory provisions, then, those holidays and other festivals for each year must be included in working days and after excluding those days of holidays and festivals, if the workman has completed 240 days in a year, such workman is entitled for the benefit of section 25-F of the ID Act, 1947. Similarly, this court has also examined the question of section 25-B(1) of the ID Act and clarified the provisions of section 25-B(2) but in the said decision, section 25B(1) was not interpreted by the apex court. That section 25B(1) has been interpreted by this court in case of MOTI CEREMIC INDUSTRIES Versus JIVUBEN RUPABHAI, reported in 2000(2) GLR 1558. The relevant observations made by this court in para 10 of the said judgment are reproduced as under:

"10. In view of the above provisions, it is clear that sub section (1) of section 25B of the Act provides that the workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service. Continuous service would be interrupted only by two modes and that is by workman leaving the employment or employer terminating his service by dismissal or discharge. Mere absence of the workman without obtaining prior leave for a days would not put an end to the continuous service of a workman. Sub section (2) opens with the words "where a workman is in continuous service within the meaning of sub clause (1)" and these words unmistakably indicate that the legislature has desire and intention to cover the cause even of those workmen who were not in continuous service for the purpose of retrenchment. Mere fact that the workman had not worked for 240 days in some year/s during his long employment would not debar him from claiming entire amount of retrenchment compensation as provided under section 25F of the

ID Act. Mere fact that during some years in his long period, the workmen had not worked for 240 days is not an answer to deprive him of the retrenchment compensation by ignoring the entire period. Once it is proved and/or found that the workman is in continuous service, then, it is wholly immaterial whether he has worked for particular number of days in a particular year. The contingency which demands the worker to work for a period of 240 days as provided by sub sec. (2) of sec. 25B of the Act would come into play provided the workman is not in continuous service as required under section 25B of the Act.

" Both, on principles and on precedent, it must be held that section 25B(2) provides a situation where the workman is not in employment for a period of 12 calender months but has rendered service for a period of 240 days within the period of 12 calender months and commencing and counting the back ward from the date of retrenchment, if he has, he would be deemed to be in service for the purpose of sec. 25B and Chapter V-A and once it is found that the workman is in continuous service under section25B(1) of the Act and the workman is satisfying the conditions and contingency mentioned in the said sub section (1), then, it is wholly immaterial whether he has worked for a particular number of days in a particular year. Contingency which demands the worker to work for a period of 240 days as provided by sub section (2) of section 25B would come into play provided the workman is not in continuous service as required under sub section 25B (1) of the ID Act."

Therefore, in view of the observations made by this Court as well as the Hon'ble apex court in aforesaid decisions and also in view of the definition of the term 'continuous service' given in section 25-B of the ID Act as interpreted by the apex court in case of American Express (supra), now, I am considering the effect of the Government Resolution dated 17.10.1988. Item 3 page 30 of the said Government Resolution dated 17.10.1988 provides that those daily wager who has completed the service of more than ten years as provided under section 25(B) shall be considered permanent and such permanent labour shall be placed in the pay scale of Rs.750-940 plus other allowances. As per the said item 3 of the said GR, it has been resolved that such daily wagers

should be given the pension, gratuity, general provident fund in accordance with the existing rules and regulations and they would be entitled for Sunday leave and national holidays leave over and above two leave per year as well as 14 days casual leave, 30 days' earned leave and 20 days half pay leave. Thus, bare reading of item 3 of the said resolution would make it clear that if the daily wager is satisfies that he has completed ten years service as required under section 25-B of the ID Act, 1947, then, he is entitled to become permanent employee of the respondent establishment. This is the only condition incorporated in item 3 of the said resolution dated 17.10.88 entitling the daily wager for claiming benefit of pension. Even the clarification which has been brought to the notice of this court. First item No.2 is also making it clear that if the daily wager has remained in continuous service as defined under section 25B of the ID Act and similarly to consider the rest of the years, then, such workman is entitled for the benefit of the Government Resolution dated 17.10.88. Item 38 and 39 thereof also saying the same thing that if the daily wager has completed 240 days continuous service in each year as defined under section 25B of the ID Act, and if the workman has completed ten years of service on the basis of such calculation for every year, then, he is entitled for the benefit of pension from the respondent establishment. It is made clear in the said GR dated 17.10.88 as well as the clarification brought to the notice of this court that it has not been clarified that they are to consider section 25B(1) or 25B(2) but the State Government has mentioned 25B as a whole which includes both namely sub section (1) and (2). In view of that, it is the duty of the State Government to consider entire section 25B with sub section (1) and (2) of the ID Act while considering the entitlement of such workman for such benefits.

In view of the above observations, the net effect of section 25-B sub section (1) is to the effect that if the daily wager has remained in continuous service for a period of one year and his service has not been interrupted by any reason mentioned mentioned in sub section (1), whatever kind of cessation of work which is not due to the fault of the daily wager, then, his service must have to be considered continuous for a period of one year irrespective of the fact whether such daily wager has completed 240 days actual work or not during this one year. Reason is that during the one year, though the daily wager has not completed 240 days continuous service, but during that period also, the services of such daily wager has not been terminated by

the employer and in-between the relationship of the employer and employee was remaining in force which makes continuous service of one year and that period must be taken into consideration irrespective of the fact that 240 days actual work has been completed or not by such daily wager but such daily wager has remained in service with the employer on permanent employment and pensionable service. Similarly, in respect of sub section (2) of section 25B of the ID Act, if the daily wager is not remaining in service for a period of 12 calender months but even less number of months but he completes 240 days working, then also, that less number of months may be considered for one year continuous service. This being two distinct and different situation incorporated by the legislature in sub section (1) and (2) of section 25B of the ID Act, if the daily wager is satisfying either of the one, then his services must have to be considered continuous for a period of one year within the meaning of section 25B of the Industrial Disputes Act, 1947.

I have minutely perused the Government Resolution dated 17.10.1988. This Resolution has been issued by the State Government after having conscious decision and consulting all the respective departments of the State Government to give certain benefits similar to a permanent employee of the State Government to the daily wagers who are working in various departments. On the basis of the report submitted by the Committee, said resolution has been issued by the Government in favour of the daily wager for regularization of their services after number of years. Item No. 1 of the said Resolution is relating to the daily wagers who have put in the service of less than five years. Such daily wagers shall be paid their daily wages in accordance with the existing Minimum Wage Rules and after completion of one year service with 240 or more actual working days, such daily wagers will be eligible for weekly off with pay, medical facility and festival holidays with pay.

As per item no.2, if the daily wager has completed more than five years but less than ten years service according to the provisions made in section 25B of the I.D. Act, 1947, then, such daily wagers are entitled to the basic salary of Rs.750.00 plus permissible dearness allowance and are also entitled for the benefit of weekly off, optional leave, 14 days CL and facility of leave with salary. Over and above that, they are also entitled for medical facility and provident fund as per item no.2. Item NO.3 is relevant for the purpose of this case. It provides that those daily wager who has

completed more than ten years service as per the provisions made in section 25(B) of the ID Act and such permanent labours will be eligible for being placed in the pay scale of Rs.750-940 with dearness allowance, house rent allowance, local compensatory allowance. It has also been resolved as per item no.3 of the said resolution that they should be given the benefits of pension, gratuity, general provident fund etc. in accordance with the existing rules. Over and above that, they will be given two days optional leave per year, 14 days casual leave, 30 days earned leave and 20 days half pay leave (medical leave) in addition to weekly off of Sunday and the leave of national festivals. Retirement age of such permanent labours will be of 60 years and the period of their continuous service will have to be considered as pensionable service.It is necessary to note that in respect of the present petitioner, the petitioner has received from the respondents an amount of gratuity and encashment of leave which is relating to item no.3 and, therefore, it is certain that the petitioner has been satisfying the requirement of item no.3 of the said resolution that he has completed ten years service within the meaning of section 25B of the ID Act, 1947 and therefore, benefit of gratuity and encashment of leave has been granted in favour of the petitioner. If such benefits were paid to the petitioner, then, why the benefit of pension has not been given to the petitioner and why technical objection has been raised that he has not completed 10 years service wherein each year he is required to have continuous service of 240 days. This aspect has not at all been taken into consideration by the respondents. Not only that but from item no.1 and 2, the petitioner was entitled for weekly off and festival holidays with wages and then, why that period was not included in his actual working days as mentioned at page 33 certified by the Deputy Executive Engineer wherein only actual working days have been mentioned but in the actual working days, weekly off and the festival holidays for which the petitioner was entitled and received wages for such holidays were not included by the respondent department and, therefore, according to my opinion, once the benefit of gratuity and encashment of leave relating to item no.3 has been granted by the respondents to the petitioner, then, there was no justification on the part of the respondents in denying the benefit of pension to the petitioner and why the days of actual work rendered by the petitioner alone have been considered without including therein the days of weekly off and festival holidays for which the petitioner was paid wages according to the said GR dated 17.10.88. If that would have been included in the actual working days of the

petitioner for the year 1982 and 1983, then, there would not have been short fall for 240 days service for the said year and this question would not have arisen and the petitioner would have enjoyed the benefit of pension. All this has happened only because of the erroneous interpretation of the GR dated 17.10.1988.

In the matter of DS Nakara and Others versus Union of India, reported in 1983 SCC Lab & Service page 145, larger bench of the Hon'ble Apex Court has observed as under in para 41 :

" The last submission, the absence of precedent need not deter us for a moment. Every new norm of socio economic justice, every new measure of social justice commenced for the first time at some point of history. If at that time it is rejected as being without a precedent, the law as an instrument of social engineering would have long since been dead and no tears would have been shed. To be pragmatic is not to be unconstitutional. In its onward march law as a institution ushers in socio economic justice. In fact, social security in old age commanded itself in earlier stages as a moral concept but in course of time it acquired legal connotation. The rules of natural justice owed their origin to ethical and moral code. Is there any doubt that they have become the integral and inseparable parts of rule of law of which any civilized society is proud ? Can anyone be bold enough to assert that ethics and morality are outside the field of legal formulations ? Socio economic justice stems from the concept of social morality coupled with abhorrence for economic exploitation. And the advancing society converts in course of time moral or ethical code into enforceable legal formulations. Over-emphasis on precedent furnishes an insurmountable road block to the onward march towards promised millennium. An overdose of precedents is the bane of our system which is slowly getting stagnant, stratified and atrophied. Therefore, absence of a precedent on this point need not deter us at all. We are all the more happy for the chance of scribbling on a clean slate. "

In view of this Government Resolution dated 17.10.88, I am now examining page 33 where the actual working days in respect of the present petitioner have been certified by the Deputy Executive Engineer, R & B

Sub Division, Panchayat at Patdi. Same is reproduced as under:

'Sr.No. Year Days of presence

1. 1978 35
2 1979 120
3 1980 180
4 1981 310
5 1982 198
6 1983 235
7 1984 252
8 1985 331
9 1986 352
10 1987 360
11 1988 354
12 1989 358
13 1990 361
14 1991 273"

From the bare perusal of these working days certified by the aforesaid authority of the Panchayat, it is clear that in the year 1981, the workman has actually worked for 310 days, in the year 1983, the workman has actually worked for 235 days; in the year 1984, for 252 days; in the year 1985, 331; in the year 1986, 352 days; in the year 1987, 360 days; in the year 1988, 354 days; in the year 1989, 358 days; in the year 1990, 361 days and in the last year, he worked for 273 days. Meaning thereby, there is a short fall of 240 days in the year 1982 and 1983. In the year 1982, there is a short fall of 42 days and in the year 1983, there is a short fall of five days. Keeping this factual position of the case before hand, and considering the observations made by the Hon'ble Apex Court in case of American Express (supra), (AIR 1986 Page 458, even if the holidays of the entire year in which the workman had worked are not included in the year 1982 and 1983 but only Sundays without any other holidays are included, the workman is entitled for salary of weekly off under the provisions of even the Minimum Wages Act and Rules framed under the Minimum Wages Act provides for such weekly off, such weekly off in a year would come to 52 and if such weekly off of 52 days is included with the actual working days of the petitioner for the year 1982, which is 198 (actual working days 198 plus 52 weekly off), then, it would come to more than 240 days. For the year 1983, the short fall is of five days alone. Therefore, even if the two months' weekly off is included, then, it would be completed 240 days in that year. The State Government has taken care of this aspect while issuing the said GR dated 17.10.88 which provides

that the daily wager who has completed ten years continuous service would become permanent employee and such a daily wager is entitled for retirement benefits like gratuity, provident fund, two days optional leave, 14 casual leave and 30 earned leave and over and above that, such workman is also entitled for weekly off and festival holidays. If the days as mentioned in item no.3 are included in the actual working days of the petitioner for the year 1982 and 1983, then, it would become clear that the workman has worked for more than 240 days during the year 1982 and 1983 and his service for the said years would fall within the definition of the term 'continuous service' given in section 25B of the ID Act. The resolution is, thus, quite clear but the interpretation thereof made by the respondents is erroneous which has deprived the petitioner of his legitimate right to get pension for the services rendered by him. I fail to understand the attitude on the part of the Panchayat authorities in not appreciating such an important aspect for a period of more than 12 years though the petitioner was time and again approaching and knocking their door either with befolded hands or with begging bawl in his hands crying for grant of pension but all in vain as it has gone to deaf ears and the petitioner has thus deprived of the pensionary benefits as the for want of proper application of mind on the part of the respondent authorities. Though the resolution dated 17.10.1988 is clear, the authorities were taking technical stand by interpreting the same in their own manner which has deprived the petitioner of his legitimate right to receive pension for such a pretty long period of about 12 years. In view of these factual aspects, considering the effect of the GR dated 17.10.88, clarification brought to the notice of this court by the learned advocate Mr. Munshaw and also keeping in mind the provisions of section 25B(1) and (2) of the ID Act,1947 wherein the term 'continuous service' has been defined and also considering the decision of the apex court reported in AIR 1986 SC 458, and one decision of this court in case of Moti Ceramics, (supra), according to my opinion, the petitioner has completed ten years service as per the said GR dated 17.10.88 and is entitled for such pensionary benefits from the respondent authorities. I am also of the opinion that the petitioner has been deprived of such legitimate right to receive pension for such a long period of about 12 years only because of the erroneous and incorrect interpretation of the GR dated 17.10.88. The legitimate claim of the petitioner for pension has been denied by the respondent authorities and on two occasions, he had approached this court earlier. Therefore, considering the prayers made by the petitioner

in para 17(B) of the petition, where the petitioner has prayed for directing the respondents to release the arrears of his pension for this much period with 18 per cent per annum from the date of his retirement 31.10.1991 till the realization thereof in full considering his initial appointment on 21.2.1978 and also to direct the respondents to pay to the petitioner his monthly pension every month regularly and without any interruption.

The petitioner is entitled for interest on the arrears of the amount of pension on the simple ground that the amount which was due to the petitioner has been utilized and wrongfully withheld by the Government for a period of about 12 years. The petitioner has suffered mental agony, faced litigation and made various representations to the authorities and incurred expenses and also suffered hardships for maintaining the family in absence of the amount of pension. The respondents have not shown any justification for not making payment of pension to the petitioner and except non application of mind and erroneous interpretation of the GR dated 17.10.88, they have not been able to raise any other plea to show that the petitioner is not entitled for such benefit as per GR dated 17.10.88. Therefore, I am of the opinion that the petitioner is entitled for the interest on the amount of arrears of pension which were payable to him from the date of his retirement 31.10.1991. Since the petitioner has been deprived of his legitimate right to receive pension and to maintain himself and his dependents in the past life on the basis of the pension by the respondents only on account of wrong and incorrect interpretation of the GR dated 17.10.1988, I am of the view that by way damages, some interest can be awarded to the petitioner by way of damages as the petitioner was repeating and reiterating his request for pension before the respondent authorities from 31.10.1991 and he was yet not paid the same for such a long period. In view of these facts, according to my opinion, the petitioner is entitled for interest upon the amount of arrears of pension for which he has been declared entitled by this Court. This Court has only clarified and interpreted the legal provisions as well as the GR dated 17.10.88 on the basis of the legal pronouncements of this court as well as the apex court referred to hereinabove and has not created any new right in favour of the petitioner but has declared that the petitioner was illegally denied his right to receive the pension. Therefore, in the facts and circumstances of the case, according to my opinion, the petitioner is not entitled for interest at the rate of 18 per cent per annum on such arrears of pension from the date of his retirement 31.10.1991 but he is entitled

to interest only at the rate of 6 per cent p.a. on the arrears of pension from the date of his retirement till such arrears are paid to him.

Before parting with the judgment or issuing directions to the respondents, it is necessary to consider the observations made by the Hon'ble Apex Court recently in the matter of Kerala State Road Transport Corporation versus K.O. Varghese and others reported in 2003 AIR SCW 2847. It has been observed by the Hon'ble Apex Court in Head Note (B) as under:

" There are different classes of pensions and different conditions govern their grant. It is almost in the nature of deferred compensation for services rendered. There is a definition of pension in Art. 366 (17) of the Constitution of India, but the definition is not all pervasive. It is essentially a payment to a person in consideration of past services rendered by him. It is a payment to a person who had rendered services for the employer, when he is almost in the twilight zone of his life. [para 12]

A pension scheme consistent with available resources must provide that the pensioner would be able to live ; (i) free from want with decency, independence and self respect and (ii) at a standard equivalent at the pre-retirement level. his approach may merit their criticism that if a developing country like India cannot provide an employee while rendering service a living wage, how can one be assured of it in retirement ? Pension is not only compensation for loyal service rendered in the past but pension also has a broader significance, in that it is a measure of socio economic justice which inheres economic security in the foil of life when physical and mental powers start ebbing corresponding to aging progress and, therefore, one is required to fall back on savings. One such saying in kind is when you gave your best in the hey day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights of emoluments to one retired from service. Thus, the pension payable to an employee is earned by rendering long and sufficient service and, therefore, can be said to

> be a deferred portion of the compensation for service rendered. In one sentence one can say that the most practical raison d'etre for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and pecuniary if there is nothing to fall back upon. It must also be noticed that the quantum of pension is a certain percentage correlated to the emoluments earlier drawn. Its payment is dependent upon an additional condition of impeccable behaviour even subsequent to retirement. That is, since the cessation of the contract of service and that it can be reduced or withdrawn as a disciplinary measure. It may be bestowed on such persons and on such terms as the law making body of the Government prescribes, and it is, at most, an expectancy granted by the law. The term 'pension' has been compared and distinguished from 'bonus', compensation', 'profits' and 'retirement payment'. A pension fund is to be distinguished from an annuity fund derived in part from voluntary contribution under a statutory option to contribute or refrain from contributing."

Therefore, in view of the observations of the Hon'ble Supreme court in the aforesaid decision and also in light of the facts of the present case, the petitioner is entitled for the pension and the respondent authorities are not justified in denying such benefit to the petitioner.

For the reasons recorded hereinabove, this petition is allowed. Order passed by the Executive Engineer of the respondent Panchayat dated 13.8.2002 page 27 is hereby quashed and set aside and it is directed to all the respondents herein to pay the pensionary benefits with all due arrears with running interest thereon at the rate of 6 per cent per annum to the petitioner with effect from the date of his retirement namely 31.10.1991 till 31st July, 2003 within the period of three months from the date of receipt of copy of this order and thereafter, to continue to make such payment of pension regularly every month without any interruption to the petitioner. Rule is made absolute accordingly with no order as to costs.

Dt.16.7.2003. (H.K. Rathod,J.)

Vyas